Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1258

In The

Supreme Court of the United States

October Term, 1990

AL GOMEZ, WARDEN OF THE DEUEL VOCATIONAL INSTITUTION OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether two federal courts correctly ruled that Mr. McKinney exhausted his state remedies, because he raised his federal issues in a habeas corpus petition to the highest state court and received a summary "postcard denial."

2. Whether the district court and the court of appeals properly determined that Mr. McKinney was denied a fundamentally fair trial, because Mr. McKinney was convicted on the basis of character evidence that was completely unrelated to any proper issue in the case.

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STATEMENT OF THE CASE

On the night of January 28, 1984, Betty McKinney died in her bed from knife wounds to her throat. Petition for Writ of Certiorari ("Pet."), App. A at 60; Pet. App. D at 96. Both her husband, Quentin McKinney, and her son, respondent Michael McKinney, were in the house at the time. Pet. App. A at 61. Both men were taken into custody. Quentin McKinney, the respondent's father, had a folding buck knife in his possession. *Id.* at 61-62. Nonetheless, Quentin McKinney was released. *Id.* at 62. Michael McKinney was detained, booked and tried for his mother's murder.

The trial began on November 13, 1984. Mr. McKinney's defense was, quite simply, that he did not kill his mother. He testified that he went to a movie that evening, returned late and went to bed. Pet. App. F at 130-31. He awoke to find his father sitting next to the blood-stained body of his mother. *Id.*

The State's case against Mr. McKinney was based on circumstantial evidence, most of which raised equivocal inferences. Pet. App. D at 97. The State had no eyewitnesses, nor was the murder weapon ever found. Pet. App. A at 60-61. The prosecutor introduced into evidence a pair of dark camouflage pants and a pair of ski gloves, both of which had blood on them. *Id.* at 77. Although the State alleged that these items were owned by Michael McKinney, *id.* at 61, either Michael or Quentin McKinney could have worn them last.

The prosecution's case hinged upon evidence that Mr. McKinney had previously owned and was "fascinated" with double-edged daggers. Pet. App. D at 105-08.

Over a defense objection, three such daggers were admitted into evidence at trial. Pet. App. A at 62; Pet. App. D at 97-98. Two of the knives introduced by the State were previously owned by Mr. McKinney. Pet. App. A at 62. The third knife was purchased by the prosecutor for display at the trial. *Id.*

These knives were not linked to the crime in any way. Mr. McKinney established that none of the knives could have been in his possession at the time of the murder. *Id.* at 75. The coroner testified that any thin-bladed knife could have caused the victim's wounds. Pet. App. D at 103-04. The coroner did not testify that Mrs. McKinney was killed with a double-edged dagger. *Id.*

The prosecutor also introduced evidence, which he characterized as proof that Mr. McKinney lived a "commando lifestyle." R.T. 755. Specifically, the prosecutor asked Mr. McKinney if he had a "fascination" with knives. Pet. App. A at 64-65. He then asked Mr. McKinney if he "was familiar with . . . techniques . . . used by commando type soldiers." *Id.* at 65. Next, the prosecutor established that Mr. McKinney had once purchased a knife favored "by commando type people." *Id.* The prosecutor also attempted to link Mr. McKinney's wearing of camouflage pants with this "commando lifestyle," R.T. 32, even though camouflage pants were a fad among college students at the time. R.T. 459-60. Also, the prosecution went so far as to introduce testimony that Mr. McKinney once dressed up like a soldier for fun, with a knife on his arm, and went to see the movie "Apocalypse Now." Pet. App. A at 65. Lastly, the prosecution elicited testimony that Mr. McKinney had once carved the words "Death is His" on a closet door in his dormitory room, and then

stuck a knife in the wall. *Id.* at 63. Two color photographs of the "Death is His" writing were placed into evidence. *Id.*

The jury returned a verdict finding Mr. McKinney guilty of first degree murder. Pet. App. D at 92. He was sentenced to a state prison term of twenty-six years to life. *Id.*

Following his conviction, Mr. McKinney filed an appeal as of right to the California Court of Appeal. Pet. App. A at. 58. He raised the same issues that are in his federal habeas corpus petition. Pet. at 6-7. The California Court of Appeal affirmed his conviction. Pet. App. A at 58. Mr. McKinney then attempted to file a petition for review, seeking discretionary review in the California Supreme Court.

The petition for review was due in the California Supreme Court on September 2, 1986. *See* Petition For Writ of Habeas Corpus filed in the California Supreme Court ("Opp. App."), appended to this brief, at 2. Mr. McKinney's attorney, however, miscalculated the filing deadline, and filed the petition one day late. Pet. App. A at 58. Three days after the petition for review was due, Mr. McKinney's attorney filed a petition for a writ of habeas corpus in the California Supreme Court. *Id.* Counsel alleged that the petition for review had not been filed on time because of his own ineffective assistance. *Id.*; Opp. App. at 2. The attorney attached to the habeas corpus petition, as an appendix, a copy of the late-filed petition for review. Paragraph VII of the state habeas corpus petition specified the legal issues (including the

federal issues) that were contained in the untimely petition for review, and stated that the "arguments are set forth in full in the appendix" to the petition. Opp. App. at 3; Pet. App. A at 58. The conclusion asked "[t]hat the Court grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction." Opp. App. at 4.

The California Supreme Court could have granted Mr. McKinney's habeas corpus petition and vacated his conviction based upon the merits of his federal claims. Instead, however, the court issued a "postcard denial." Pet. App. A at 58, 72-73. As the record in this case reflects, the Supreme Court told Mr. McKinney only that the habeas corpus petition was denied. *Id.* at 58-59; Pet. App. E at 119. No reason for the denial was given.

Following this denial, Mr. McKinney filed his federal habeas corpus petition. Pet. App. A at 59. The petition was referred to a magistrate-judge. *Id.* He determined that Mr. McKinney had exhausted his state remedies. *Id.*; Pet. App. C at 88. The magistrate-judge also found that "[t]he only logical inference raised by the [knife and commando lifestyle evidence] is that [Mr. McKinney] was the kind of person who surrounded himself with deadly weapons, and he therefore had a disposition or propensity to commit the offense charged." Pet. App. D at 110. Further, "the prosecution painted a picture of an obsessive, knife-wielding defendant, and based a large part of its case on the concept that this materially contributed to the proof of [Mr. McKinney's] guilt." *Id.* at 109-10. Accordingly, the magistrate-judge found that this evidence violated the character rule and denied Mr. McKinney a fundamentally fair trial in violation of the

fourteenth amendment. *Id.* at 111. The magistrate-judge recommended to the district court that it grant Mr. McKinney's petition, unless charges were refiled against Mr. McKinney within ninety days. *Id.* at 113. The district court followed the recommendation. Pet. App. A at 60.

The State appealed to the United States Court of Appeals for the Ninth Circuit. That court also found that Mr. McKinney had exhausted his state remedies. *Id.* at 72-73. The court of appeals affirmed the district court's decision on the merits, stating that "[g]iven the inherently prejudicial nature of the evidence, coupled with the improper emphasis placed on this evidence by the prosecutor, we conclude that [Mr.] McKinney's trial was fundamentally unfair" in violation of the fourteenth amendment. *Id.* at 80-81.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeals' Ruling That Mr. McKinney Gave The California Supreme Court A Fair Opportunity To Decide His Federal Claims Is Consistent With Decisions of this Court and Is Not Otherwise Suitable For Review.

The petitioner's application for a writ of certiorari should be denied. In alleging that the court of appeals' decision conflicts with established law, the State has mischaracterized the facts relating to the exhaustion issue and has thus relied on inapposite law. Furthermore, there are no "special and important" federal questions for this Court to review. Sup. Ct. R. 10.

A. The Complete Facts Demonstrate That The California Supreme Court Had A Fair Opportunity To Decide The Federal Claims.

In the first question in its petition for writ of certiorari, the State mischaracterizes the facts relating to the exhaustion issue. The State makes an incorrect and unsupported assertion that Mr. McKinney's state habeas corpus petition "alleg[ed] *solely* ineffective assistance of counsel, in that appellate counsel negligently failed to timely file the Petition for Review." Pet. at 29 (emphasis in original).[1] Mr. McKinney's state habeas corpus petition raised more than just a claim of ineffective assistance of counsel. The court of appeals found that paragraph VII of Mr. McKinney's state habeas corpus petition "referred directly to four grounds on which he believed his conviction should be overturned." Pet. App. A at 71-72; Opp. App. at 2-3. In addition to specifying the federal grounds, Mr. McKinney's habeas corpus petition stated that "[a]ll four arguments are set forth in full in the appendix." Opp. App. at 3. The State concedes that the appendix "contained the issue, *inter alia*, upon which the federal habeas writ was ultimately granted." Pet. at 29.

Elsewhere in its petition, the State ignores this evidence and these findings. Instead, the State alleges that simply because Mr. McKinney's claims were set forth more fully in an appendix, the California Supreme Court had "*no* 'opportunity' at all, let alone a 'fair' one, to

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[1] The State did not append to the petition for writ of certiorari a copy of Mr. McKinney's state petition for writ of habeas corpus, filed in the California Supreme Court. A copy of the state habeas corpus petition is appended to this brief.

consider [the federal claims]." *Id.* at 31 (emphasis in original). The State does not explain why the California Supreme Court was incapable of reading paragraph VII, which summarized the claims, and of referring to the appendix.

Furthermore, in its petition, the State incorrectly asserts that Mr. McKinney never requested the California Supreme Court to adjudicate the claims that were fully set forth in the untimely appeal. *Id.* at 30. The district court expressly found that Mr. McKinney had requested the state court to adjudicate the claims set forth in his petition. Relying upon the last paragraph of the state habeas corpus petition, the district court ruled that: "[Mr. McKinney requested] that the court 'grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction' on the 'issues . . . contained in the petition.' " Pet. App. C at 87 (emphasis in original).[2]

Thus, as both the federal court of appeals and the district court ruled, Mr. McKinney "fairly presented" his

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[2] This Court should also understand that Mr. McKinney in fact obtained a written opinion on the merits from the highest state court likely to review his federal claims. Mr. McKinney presented his federal claims to the California Court of Appeal, which rejected them. The California Supreme Court grants very few petitions for review in non-capital criminal cases. In fiscal year 1986-87, the year in which Mr. McKinney filed his state habeas corpus petition, the California Supreme Court granted only 4% (50 out of 1,145) of the petitions seeking review in non-capital criminal cases. 2 *Annual Report, Judicial Council of California* 27 (Table T-6) (1989). During the same period, the California Supreme Court also reviewed only 4% (21 out of 525) of the "criminal original proceedings" (which include habeas corpus petitions) filed with that court. *Id.*

claims to the highest state court. *Id.* at 88; Pet. App. A at 70-73. Mr. McKinney's state habeas corpus petition summarized his federal claims. An appendix to the petition elaborated upon those claims. After presenting his claims to the California Supreme Court, Mr. McKinney received a "postcard denial," which as the courts below have properly held, was a ruling on the merits of his claims. Mr. McKinney exhausted his state remedies.

B. The Court of Appeals' Decision Is Consistent With Authority From This Court.

Although Mr. McKinney afforded the California Supreme Court a fair opportunity to rule on the merits of his federal claims, that court summarily denied his petition. Mr. McKinney received a "postcard denial," a notice stating only that the petition was denied. The court of appeals correctly ruled, under *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974) (*en banc*), *cert. denied*, 420 U.S. 973 (1975), that the postcard denial was a decision on the merits and that Mr. McKinney had therefore exhausted his state remedies.

The doctrine of exhaustion of state remedies requires a petitioner to give the highest state court the first opportunity to decide the petitioner's federal claims. *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal claims must be "fairly presented" to the state court. *Id.* at 275.

The exhaustion requirement is met even if the state court does not actually address the claims in a written opinion, so long as it had a fair opportunity to do so. *Smith v. Digmon*, 434 U.S. 332, 333 (1978). A potential state procedural bar only forecloses federal habeas review if

the state court's opinion contains a "plain statement" that its decision rests upon state grounds. *Harris v. Reed*, 489 U.S. 255, 261-62 (1989) (applying *Michigan v. Long*, 463 U.S. 1032 (1983), to habeas corpus proceedings). A post-card denial is not a plain statement indicating a procedural denial. In the Ninth Circuit, and in at least one other circuit, a petitioner who raises his or her federal issues in a state habeas corpus petition and who receives a "postcard denial" has exhausted his or her state remedies. *Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974) (*en banc*), *cert. denied*, 420 U.S. 973 (1975); *see also Ridgway v. Baker*, 720 F.2d 1409, 1412-13 (5th Cir. 1983).

The *Harris v. Superior Court* rule does not prevent the federal courts from respecting a state court's decision to dismiss on procedural grounds. In *Harris v. Superior Court*, the court of appeals noted that the California Supreme Court often cites authority to indicate the grounds for dismissing a state habeas corpus petition. 500 F.2d at 1127-28. But unless there is a citation in the California Supreme Court's order, "[t]here is . . . no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition." *Id.* at 1128. Thus, the exhaustion requirement is satisfied "when the California Supreme Court denies a habeas corpus petition without opinion or citation, or when it otherwise decides on the merits of the petition." *Id.* at 1128-29.

At the time Mr. McKinney's state habeas corpus petition was denied, the California Supreme Court was aware of the bright-line *Harris v. Superior Court* rule. If the California Supreme Court believed that Mr. McKinney's petition was defective because some arguments were set

forth more fully in an appendix to which the petition referred, the California Supreme Court would have so indicated in its order. *See Harris v. Reed*, 489 U.S. at 266 n.12 ("[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' ")

This Court should not grant the State's petition for writ of certiorari. *Harris v. Superior Court* is fully consistent with decisions from this Court. Furthermore, the State does not allege – and, indeed, it cannot allege – that the *Harris v. Superior Court* bright-line rule conflicts with decisions in other circuits. There are no "special and important" reasons for granting the State's petition, within the meaning of Supreme Court Rule 10.

2. This Case Is Inappropriate For Review Because The State Merely Claims That The Court of Appeals Misapplied Settled Legal Standards To The Unique Facts of This Case.

In this case, the State, Mr. McKinney, the district court and the court of appeals all agree on the governing legal standards. The State agrees that the Constitution of the United States guarantees every defendant a fundamentally fair trial. Pet. at 43-44. The State, however, claims that the court of appeals erroneously determined that Mr. McKinney's trial was fundamentally unfair. *Id.* at 45. The State's petition does not raise any special or important reasons why this Court should review this case. The State is merely arguing that the court of appeals misapplied settled legal standards to a unique set of facts.

There are two legal principles which govern the merits of this case. First, under 28 U.S.C. section 2254, a

writ of habeas corpus may be granted on behalf of a state prisoner if "he is in custody in violation of the Constitution . . . of the United States." In *Kimmelman v. Morrison*, 477 U.S. 365, 377-78 (1986), this Court held that habeas corpus is available to remedy the violation of a right deemed to be "fundamental." The State does not dispute this point.

Second, the due process clause of the fourteenth amendment guarantees every criminal defendant a fundamentally fair trial. "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). *See also Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (a trial before a judge who has an interest in the matter violates the due process clause). The State concedes this point. Pet. at 43-44.

Taken together, these legal principles mean that a federal court may properly grant a habeas corpus petition if a state prisoner is denied a fundamentally fair trial. Of course, federal courts do not, and should not, remedy every evidentiary error in every state criminal proceeding. That much was made clear in *Spencer*, 385 U.S. at 562. In *Spencer*, this Court determined that the introduction of evidence of a defendant's prior criminal conviction, which was presented in a non-inflammatory fashion, *id.* at 562, did not result in a fundamentally unfair trial. *Id.* at 559. Yet, this Court did not say in *Spencer* that introduction of character evidence could *never* result in a fundamentally unfair trial. When egregious evidentiary errors have resulted in fundamentally unfair trials, federal courts have remedied these constitutional violations. *See,*

e.g., Rivera v. Director, Department of Corrections, 915 F.2d 280 (7th Cir. 1990) (exclusion of exculpatory hearsay evidence made trial unfair); *Panzavecchia v. Wainwright*, 658 F.2d 337 (5th Cir. 1981) (evidence of prior unrelated conviction denied defendant a fair trial). *Cf. Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of exculpatory evidence by prosecutor violates due process clause).

In this case, the court of appeals merely applied these settled legal principles to a unique set of facts. The court below determined that admission of irrelevant character evidence so prejudiced Mr. McKinney that he was denied a fundamentally fair trial. The State, however, suggests that the court of appeals misapplied these principles. The State claims that the court of appeals somehow found the admission of character evidence to be constitutional error *per se*. Pet. at 50. This claim is incorrect.

The district court examined the trial transcript and found that Mr. McKinney was denied a fundamentally fair trial, in violation of the Constitution. Pet. App. D at 96-108, 112. The court of appeals also reviewed the transcript, along with the district court's findings of fact, and affirmed the decision. The court of appeals concluded that because of the extreme prejudicial value of the character evidence, and because of the lack of other inculpatory evidence, Mr. McKinney's trial was *fundamentally unfair*. Pet. App. A at 60-66, 80-81. The appellate court specifically found that "[g]iven the inherently prejudicial nature of the evidence, coupled with the improper emphasis placed on this evidence by the prosecutor, . . . McKinney's trial was *fundamentally unfair*." *Id.* at 80-81 (emphasis added). The court of appeals did not

rule, as the State suggests, that the introduction of character evidence is *per se* unconstitutional. Rather, the court of appeals examined the entire record and based its ruling upon the transcript of the entire trial.

The State also suggests that the court of appeals found constitutional error simply because the character evidence was not "harmless" under *Chapman v. California*, 386 U.S. 18 (1967). Not so. In its memorandum decision, the court of appeals clearly stated that the central issue was whether the error was of constitutional magnitude. The court wrote that "[t]he question of whether the erroneous admission of character evidence rose to the level of a constitutional violation *depends on whether the questionable evidence was so prejudicial that it rendered McKinney's trial fundamentally unfair.*" Pet. App. A at 76-77 (emphasis added; citation omitted). The court went on to find constitutional error because the trial was fundamentally unfair. *Id.* at 80-81.

This case is inappropriate for Supreme Court review. The parties agree on the applicable legal standards. Everyone agrees that a habeas corpus petition may be granted if a trial is fundamentally unfair. The petitioner does not allege that there is disagreement among the circuits regarding these legal standards. The State merely wants this Court to review the application of settled legal principles to the facts of this case. This factual analysis would be inappropriate for the Court: "We do not grant a certiorari to review evidence and discuss specific facts." *Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Statement of Stevens, J., respecting the denial of certiorari, quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)).

3. The Lower Federal Courts Properly Ruled That Mr. McKinney Was Denied A Fundamentally Fair Trial.

The federal district court found that Mr. McKinney was denied a fundamentally fair trial, a violation of the Constitution, because of the admission of highly prejudicial character evidence. The district court therefore granted Mr. McKinney's petition for writ of habeas corpus. The court of appeals properly affirmed the district court's finding of fact and conclusions of law.

The "character rule" is fundamental to jurisprudence in this country. The New York Court of Appeals stated that the character rule "has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta." *People v. Molineux*, 168 N.Y. 264, 291, 61 N.E. 286, 293 (1901). Some early cases applying the character rule include *Hampden's Trial*, 9 How. St. Tr. 1053, 1103 (Eng. 1684) (forbidding use of evidence of "any other forgeries, but that for which he was indicted") and *Rex v. Doaks*, Quincy's Mass. Reports 90, 91 (Mass. Sup. Ct. 1763) (excluding evidence of the defendant's "general ill Character"). The character rule "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States*, 335 U.S. 469, 475 (1948) (footnote omitted).[3] Therefore, character evidence is generally excluded[4] – people are tried for what they do, not

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[3] *Michelson* was decided before the Federal Rules of Evidence were enacted. It reviewed the common-law roots of the character rule.

[4] Character evidence is, however, admissible when it is particularly probative to show intent, identity, malice, motive,

(Continued on following page)

who they are. The character rule prevails "in nearly all common-law jurisdictions." *Spencer v. Texas*, 385 U.S. 554, 561 n.7 (1967). It is embodied in Federal Rule of Evidence 404(b) as well as section 1101 of the California Evidence Code.

In this case, the trial court erroneously allowed the State to introduce character evidence relating to knife ownership. During the trial, the prosecutor introduced into evidence two knives that had been previously owned by Mr. McKinney. To magnify the effect, the prosecutor also introduced into evidence another knife, which he himself had purchased. Yet, the State failed to connect any of the knives to the crime. Mr. McKinney established that none of the knives could have been the murder weapon, because they could not have been in his possession at the time of the murder. Moreover, the coroner – the State's witness – testified that the murder could have been committed with any thin-bladed knife.

In addition, the trial court allowed the prosecutor to try to prove that Mr. McKinney led a "commando lifestyle." The prosecutor introduced testimony that Mr. McKinney had a "fascination" with knives, that he sharpened the knives on several occasions, and that during a power outage at school, Mr. McKinney strapped a knife

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(Continued from previous page)

modus operandi or an element of the offense. *See Spencer v. Texas*, 385 U.S. 554, 560-1 (1967) (discussing evidence of prior crimes, a form of character evidence). Character evidence may also be introduced when the defendant makes it an issue, or where the State attempts to impeach the defendant's credibility. *Id.* Other than these circumstances, character evidence is not admissible.

on, went out somewhere, and stayed out half the night. The prosecutor also introduced evidence that Mr. McKinney dressed up like a soldier to see "Apocalypse Now." Lastly, the trial court allowed the prosecutor to elicit testimony that Mr. McKinney had allegedly carved the words "Death is His" on a door at school, and the prosecutor even put before the jury color photographs of the carving.

The evidence about knives and "commando lifestyle" was not probative of any proper issue in the case. It merely raised improper inferences regarding Mr. McKinney's character. As the district court ruled, "the prosecution painted a picture of an obsessive, knife-wielding defendant, and based a large part of its case on the concept that this materially contributed to the proof of [Mr. McKinney's] guilt." Pet. App. D at 109-110. The court of appeals affirmed, concluding that this evidence lacked probative value and raised the exact type of inference the character rule was created to prevent. Pet. App. A at 79. The court found that this evidence "was erroneously admitted to show that [Mr. McKinney] acted in conformity with his character rather than to connect him to the crime with which he was charged," *Id.* at 75, and concluded that Mr. McKinney's trial was "fundamentally unfair." *Id.* at 81.

As both federal courts decided, the state court's error denied Mr. McKinney a fundamentally fair trial and, therefore, rose to the level of a constitutional violation. Based upon its findings of fact, the district court determined that Mr. McKinney would not have been convicted without the improper propensity evidence. Pet. App. D at 112. The court of appeals correctly affirmed. This Court

should not disturb the reasoned judgments of these two federal courts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

(Petition For Writ of Habeas Corpus in the California Supreme Court)

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN RE MICHAEL SHERIDAN McKINNEY,	)	CRIM. ___
Petitioner,	)	NO. 2D
on Habeas Corpus.	)	CRIM. B011378

PETITION FOR WRIT OF HABEAS CORPUS
TO THE CHIEF JUSTICE AND TO THE ASSOCIATE
JUSTICES OF THE CALIFORNIA SUPREME COURT.

Petitioner, Michael Sheridan McKinney, by and through his attorney Dennis L. Cava, hereby petitions for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of said writ.

I

Petitioner is illegally confined and restrained of his liberty at the state prison in Tracy, California.

II

Petitioner is confined pursuant to an order of Honorable Michael Berg sentencing him to state prison for 26 years to life, after a jury found him guilty of first degree murder.

III

On February 6th, 1985, petitioner filed a timely notice of appeal.

IV

On July 24, 1986, the Court of Appeal affirmed the trial court judgment of conviction.

V

On July 27th, 1986, petitioner was informed by court appointed attorney, Dennis L. Cava, that he intended to file a petition for review in the California Supreme Court.

VI

Due to a miscalculation of the days from the date of the opinion of the Court of Appeal, appellate counsel failed to file said petition for review by September 2nd, 1986, which was the filing deadline.

VII

As the result of appellate counsel's failure to timely file said petition for review by September 2nd, 1986, petitioner was denied his constitutional right to the effective assistance of counsel, considering the said petition for review raised the following four potentially meritorious arguments:

(1) "Appellant's extrajudicial statements were illegally obtained by the police because they were elicited

after appellant invoked his constitutional right to counsel."

(2) "Evidence that appellant possessed two knives at a time prior to the killing of the victim was improperly admitted because it was irrelevant."

(3) "Evidence that appellant expressed resentment and hostility towards his parents prior to the death of his mother was improperly admitted as to the issue of motive for the killing of the victim, when it was sheer speculation that appellant might have killed his mother because of resentment and hostility."

(4) "Evidence of appellant's bad character and propensity for violence was improperly admitted as evidence, when the defense never placed appellant's character for peacefulness in issue." All four arguments are set forth in full in the appendix.

VIII

If appellate counsel had not deprived petitioner of his right to have the Supreme Court review the four enumerated arguments that were rejected by the Court of Appeal, it is reasonably possible the Supreme Court would have granted said petition for review and would have reversed the trial court judgment of conviction.

IX

Petitioner had not previously filed a petition for writ of habeas corpus or a petition for writ of mandate raising the issues that is [sic] contained in this petition.

WHEREFORE, petitioner respectfully prays:

1. That the Court grant this petition for writ of habeas corpus and reverse the trial court judgment of conviction.

2. For such other and further relief as this Court deems just.

DATED: September 5th, 1986

Respectfully submitted,

/s/

DENNIS L. CAVA
Attorney for Petitioner